APPEAL NO. 030018
FILED FEBRUARY 6, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on November 13, 2002. The hearing officer resolved the disputed issue by deciding that the appellant/cross-respondent (claimant) was not entitled to supplemental income benefits (SIBs) for the 10th quarter. The claimant appealed, arguing that the determination of nonentitlement was so against the great weight and preponderance of the evidence as to be manifestly unjust and erroneous as a matter of law. The claimant disputed the finding that there was another record that showed he is able to return to work and the finding that he did not make a good faith effort to seek employment. The respondent/cross-appellant (carrier) responded, urging affirmance. In its cross-appeal, the carrier appealed the findings that the claimant established by medical evidence that he was unable to perform any work at all during part of the 10th quarter and that the claimant was unemployed as a direct result of the impairment. The appeal file did not contain a response from the claimant.

DECISION

Affirmed as reformed.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The carrier appeals the hearing officer's findings in favor of the claimant on the direct result criteria for SIBs entitlement for the 10th quarter. The claimant appeals the hearing officer's findings on the good faith criteria.

Rule 130.102(c) provides that an injured employee has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury if the impairment from the compensable injury is a cause of the reduced earnings. The medical reports from the claimant's treating doctor and the claimant's testimony sufficiently support the hearing officer's finding that the claimant did not return to employment as a direct result of his impairment.

Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee as been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. The hearing officer found that there was sufficient medical evidence to establish that the claimant was unable to work during part of the qualifying period but found that a July 31, 2002, report showed that the claimant is able to return to work. In this report Dr. C opined that the claimant's condition is compatible with a release to work at a sedentary duty level with no lifting greater than 10 to 15 pounds.

Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). When reviewing a hearing officer's decision for factual sufficiency of the evidence, we should reverse such decision only if it is so contrary to the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard, we find no grounds to reverse the challenged findings of the hearing officer.

With regard to the good faith criterion, Rule 130.102(e) provides that, except as provided in subsection (d)(1), (2), (3) and (4) of Rule 130.102, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts. That subsection then lists information to be considered in determining whether a good faith effort has been made. The hearing officer noted that the claimant "was clearly applying for positions for which he was not qualified." Good faith effort is a factual determination for the hearing officer to resolve. There is sufficient evidence to support the challenged finding of the hearing officer.

In his appeal, the claimant, citing Section 409.149, argues that "the hearing officer erred as a matter of law in concluding that a carrier is entitled to a 'direct result' determination for every quarter disputed within a twelve month period." The claimant acknowledged that the alleged error is harmless and does not require reversal given the finding of direct result in the claimant's favor. Each compensable quarter stands alone and the determinations in one quarter are not necessarily binding on subsequent quarters. *See* Texas Workers' Compensation Commission Appeal No. 000512, decided April 24, 2000. We note that Section 408.086 provides for a determination by the Texas Workers' Compensation Commission on the direct result criterion "at least annually," which indicates that such a determination may be made more frequently if necessary. Each time the issue of entitlement to SIBs is raised at a CCH, the hearing officer is obligated to apply Rule 130.102(b), thereby making it necessary to determine if the direct result criterion has been met. It necessarily follows that such a determination by the hearing officer may well have to be made more than once every 12 months. We are unaware of any decision which holds that a hearing officer's finding on the direct result criterion in one quarter is binding on the hearing officer for 12 months thereafter. *See* Texas Workers' Compensation Commission Appeal No. 010565, decided April 23, 2001.

The hearing officer mistakenly attributed the author of the July 31, 2002, report as the designated doctor. We reform Finding of Fact No. 3 to read as follows: The

report of Dr. C dated July 31, 2002, constituted a record that shows the claimant is able to return to work.

We affirm the decision and order of the hearing officer as reformed.

The true corporate name of the insurance carrier is **INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Judy L. S. Barnes
Appeals Judge

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Thomas A. Knapp
Appeals Judge